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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

BY AM DEPUTY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

ABNER H. LISTER,
CDCR #P-54884,

Plaintiff,

vs.

MATTHEW CATE, Secretary of the
California Department of Corrections and
Rehabilitation; GEORGE A. NEOTTI,
Warden,

Defendants.

Civil No. 09-2249 W (WMc)

ORDER:

**(1) GRANTING MOTION TO
PROCEED *IN FORMA PAUPERIS*,
IMPOSING NO INITIAL PARTIAL
FILING FEE, GARNISHING \$350
FROM PRISONER'S TRUST
ACCOUNT [Doc. No. 2]; AND**

**(2) SUA SPONTE DISMISSING
COMPLAINT FOR FAILING
TO STATE A CLAIM
PURSUANT TO
28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

Abner Lister ("Plaintiff"), a state prisoner currently incarcerated at the Richard J. Donovan Correctional Facility located in San Diego, California and proceeding pro se, has filed a civil rights action pursuant to 42 U.S.C. § 1983. Plaintiff has not prepaid the \$350 filing fee mandated by 28 U.S.C. § 1914(a); instead, he has filed a certified copy of his prison trust account statement which the Court liberally construes to be a Motion to Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2].

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I. MOTION TO PROCEED IFP [DOC. NO. 2]

All parties instituting any civil action, suit or proceeding in a district court of the United States, except an application for writ of habeas corpus, must pay a filing fee of \$350. *See* 28 U.S.C. § 1914(a). Prisoners granted leave to proceed IFP remain obligated to pay the entire fee in installments, regardless of whether their action is ultimately dismissed. *See* 28 U.S.C. § 1915(b)(1) & (2); *Taylor v. Delatoore*, 281 F.3d 844, 847 (9th Cir. 2002).

Section 1915, as amended by the Prison Litigation Reform Act ("PLRA"), further requires that each prisoner seeking leave to proceed IFP submit a "certified copy of [his] trust fund account statement (or institutional equivalent) ... for the six-month period immediately preceding the filing of the complaint." 28 U.S.C. § 1915(a)(2). The institution having custody of the prisoner must collect payments, assessed at 20% of the preceding month's income, in any month in which his account exceeds \$10, and forward those payments to the Court until the entire filing fee is paid. *See* 28 U.S.C. § 1915(b)(2).

The Court finds that Plaintiff has submitted a certified copy of his prison trust account statement pursuant to 28 U.S.C. § 1915(a)(2) and Civil Local Rule 3.2. Plaintiff's trust account currently indicates that he has insufficient funds from which to pay an initial partial filing fee. Thus, the Court hereby **GRANTS** Plaintiff's Motion to Proceed IFP [Doc. No. 2], and assesses no initial partial filing fee at this time. *See* 28 U.S.C. § 1915(b)(1). However, Plaintiff is required to pay the full \$350 filing fee mandated by 28 U.S.C. §§ 1914(a) and 1915(b)(1), by subjecting any future funds credited to his prison trust account to the installment payment provisions set forth in 28 U.S.C. § 1915(b)(2).

II. SUA SPONTE SCREENING PER 28 U.S.C. §§ 1915(e)(2) & 1915A

The PLRA also obligates the Court to review complaints filed by all persons proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Under these provisions, the Court must sua sponte dismiss any IFP or prisoner complaint, or any portion

1 thereof, which is frivolous, malicious, fails to state a claim, or which seeks damages from
 2 defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A; *Lopez v. Smith*, 203
 3 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v. Hayes*, 213 F.3d 443,
 4 446 (9th Cir. 2000) (§ 1915A).

5 **A. 42 U.S.C. § 1983**

6 Section 1983 imposes two essential proof requirements upon a claimant: (1) that a person
 7 acting under color of state law committed the conduct at issue, and (2) that the conduct deprived
 8 the claimant of some right, privilege, or immunity protected by the Constitution or laws of the
 9 United States. *See* 42 U.S.C. § 1983; *Parratt v. Taylor*, 451 U.S. 527, 535 (1981), *overruled on*
 10 *other grounds by Daniels v. Williams*, 474 U.S. 327, 328 (1986); *Haygood v. Younger*, 769 F.2d
 11 1350, 1354 (9th Cir. 1985) (en banc).

12 **B. Eighth Amendment Claims**

13 Plaintiff's Complaint is subject to sua sponte dismissal pursuant to 28 U.S.C. § 1915(e)(2)
 14 because it fails to state an Eighth Amendment claim. Plaintiff alleges that there is overcrowding
 15 in the prison. (*See* Compl. at 3.) However, allegations of overcrowding, without additional
 16 facts, are insufficient to state a claim under the Eighth Amendment. *See Rhodes v. Chapman*,
 17 452 U.S. 337, 348 (1981).

18 Plaintiff also appears to claim that he has been unable to receive adequate medical care
 19 for his mental health problems. (*See* Compl. at 3.) In order to assert a claim for inadequate
 20 medical or mental care, Plaintiff must allege the defendant was "deliberately indifferent to his
 21 serious medical needs." *Helling v. McKinney*, 509 U.S. 25, 32 (1993); *Estelle v. Gamble*, 429
 22 U.S. 97, 106 (1976). This rule applies to "physical, dental and mental health." *Hoptowit v. Ray*,
 23 682 F.2d 1237, 1253 (9th Cir. 1982).

24 "[S]tate prison authorities have wide discretion regarding the nature and extent of medical
 25 treatment." *Jones v. Johnson*, 781 F.2d 769, 771 (9th Cir. 1986). Thus, to state a claim for
 26 cruel and unusual punishment, Plaintiff must allege both: (1) an objectively "serious" medical
 27 need, *i.e.*, one that a reasonable doctor would think worthy of comment, one which significantly
 28 affects his daily activities, or one which is chronic and accompanied by substantial pain, *see*

1 *Doty v. County of Lassen*, 37 F.3d 540, 546 (9th Cir. 1994); and (2) a subjective, and
 2 “sufficiently culpable” state of mind on the part of each individual defendant. *See Wilson v.*
 3 *Seiter*, 501 U.S. 294, 302 (1991).

4 Here, Plaintiff must allege that Defendants knew of a serious need for medical treatment,
 5 yet nevertheless disregarded his need despite the excessive risk posed to Plaintiff’s health or
 6 safety. *See Farmer*, 511 U.S. at 837. However, Plaintiff does not identify any staff member or
 7 correctional officer who knew of, but disregarded his requests for mental health treatment.
 8 While Plaintiff names the Warden and the Secretary of the California Department of Corrections
 9 and Rehabilitation as Defendants, Plaintiff does not identify what, if any, role these Defendants
 10 directly played in Plaintiff’s medical and mental health treatment. The indifference to medical
 11 needs also must be substantial; inadequate treatment due to malpractice, or even gross
 12 negligence, does not amount to a constitutional violation. *Estelle*, 429 U.S. at 106; *Wood v.*
 13 *Housewright*, 900 F.2d 1332, 1334 (9th Cir. 1990).

14 While Plaintiff may have alleged facts sufficient to demonstrate a “serious” mental health
 15 need, he fails to identify any individual person that was aware of his “serious” medical need, let
 16 alone “deliberately indifferent” to it. *Estelle*, 429 U.S. at 104-05. For these reasons, the Court
 17 finds that Plaintiff’s Complaint fails to state any Eighth Amendment claim upon which § 1983
 18 relief can be granted, and thus, this action must be dismissed pursuant to 28 U.S.C.
 19 §§ 1915(e)(2)(B) and 1915A(b). *See Lopez*, 203 F.3d at 1126-27; *Resnick*, 213 F.3d at 446.

20 **III. CONCLUSION AND ORDER**

21 Good cause appearing therefor, **IT IS HEREBY ORDERED** that:

22 1. Plaintiff’s Motion to Proceed IFP pursuant to 28 U.S.C. § 1915(a) [Doc. No. 2]
 23 is **GRANTED**.

24 2. The Secretary of California Department of Corrections and Rehabilitation, or his
 25 designee, shall collect from Plaintiff’s prison trust account the \$350 balance of the filing fee
 26 owed in this case by collecting monthly payments from the account in an amount equal to twenty
 27 percent (20%) of the preceding month’s income and forward payments to the Clerk of the Court
 28 each time the amount in the account exceeds \$10 in accordance with 28 U.S.C. § 1915(b)(2).

1 ALL PAYMENTS SHALL BE CLEARLY IDENTIFIED BY THE NAME AND NUMBER
2 ASSIGNED TO THIS ACTION.

3 3. The Clerk of the Court is directed to serve a copy of this Order on Matthew Cate,
4 Secretary, California Department of Corrections and Rehabilitation, 1515 S Street, Suite 502,
5 Sacramento, California 95814.

6 **IT IS FURTHER ORDERED** that:

7 4. Plaintiff's Complaint is **DISMISSED** without prejudice pursuant to 28 U.S.C.
8 §§ 1915(e)(2)(b) and 1915A(b). However, Plaintiff is **GRANTED** forty five (45) days leave
9 from the date this Order is filed in which to file a First Amended Complaint which cures all the
10 deficiencies of pleading noted above. Plaintiff's Amended Complaint must be complete in itself
11 without reference to the superseded pleading. *See* S.D. CAL. CIVLR 15.1. Defendants not
12 named and all claims not re-alleged in the Amended Complaint will be considered waived. *See*
13 *King v. Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987). Further, if Plaintiff's Amended Complaint
14 fails to state a claim upon which relief may be granted, it may be dismissed without further
15 leave to amend and may hereafter be counted as a "strike" under 28 U.S.C. § 1915(g). *See*
16 *McHenry v. Renne*, 84 F.3d 1172, 1177-79 (9th Cir. 1996).

17
18 DATED: _____

11/2/09


19 **HON. THOMAS J. WHELAN**
20 United States District Judge
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